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IN THE
Supreme Court of the United States

YASER ESAM HAMDI, *et al.*, Petitioners,

v.

DONALD RUMSFELD, *et al.*, Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

Amicus American Center for Law and Justice (ACLJ) is a public interest law firm committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court. ACLJ attorneys have argued numerous cases involving constitutional issues before lower federal courts and state courts throughout the United States.

The ACLJ is concerned about attempts to subvert the authority of the Executive to deal with the exigencies of war in all its facets and to transfer such authority to the criminal justice system and to the Judiciary. Captured enemy combatants are held in preventive, not punitive, detention as a direct result of their belligerency. Consequently, neither the domestic law of the United States nor the law of war permits captured enemy combatants – whether foreign nationals or United States citizens – to demand that they be tried in the domestic courts of the Detaining Power.

Petitioner Hamdi is not being detained on criminal charges. Instead, having been determined by the President of the United States, acting pursuant to his Constitutional authority as Commander-in-Chief, to be an enemy

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

combatant,[2] Hamdi is being held in military custody (1) to ensure that he cannot rejoin the enemy and participate in any future terrorist activity and (2) to obtain information of intelligence value to thwart such terrorist attacks on targets within the United States. The ACLJ urges this Court to affirm the decision of the Fourth Circuit.

SUMMARY OF ARGUMENT

The underlying facts at issue in this matter are well-known and need little elaboration. On September 11, 2001, the United States was brutally attacked by members of the *al-Qaeda*[3] international terrorist organization.[4] *Al-Qaeda* terrorists hijacked four civilian airliners to use as weapons to attack economic and political targets in the United States. Terrorists crashed two airliners into the World Trade Center towers in New York City and a third airliner into the

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[2] *See The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (noting that it is the President who determines whether those who threaten the Nation have "the character of belligerents," and, once that determination is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power is entrusted").

[3] Because Arabic words must be transliterated into English, there are often different spellings. For example, "*al-Qaeda*" is often transliterated as "*al-Qaida*." To avoid confusion, "*al-Qaeda*" will be used in this brief. Where that term is transliterated differently in a source cited in this brief, it will be changed to the above spelling without further notation.

[4] *Al-Qaeda* is "a transnational organization with global ambitions. Its tactics are illegal, but its goals are political. Indeed, they are geopolitical – to drive American influence from the Islamic world, to establish a new caliphate there and to renew the medieval war for dominance between Islam and the West." David B. Rivkin, Jr., et al., *The Law and War*, part 1, WASH. TIMES, Jan. 26, 2004 ("Rivkin1"), at A19. Moreover, on 9-11, "*al-Qaeda* did what few modern states can do – it projected power." *Id.*

Pentagon in northern Virginia. The fourth plane crashed in Pennsylvania when airline passengers thwarted the hijackers' mission. Thousands of United States citizens, as well as hundreds of foreign nationals, were killed in the attacks. The President of the United States took immediate steps as Commander-in-Chief of the armed forces to protect the Nation against further such attacks.

Within days of the attacks, the United States Congress, agreeing with the President that the attacks on the United States constituted acts of war, authorized the President to use military force in response. The President ordered United States armed forces to seek out and destroy the terrorists responsible for the attacks and those who give them safe haven. Less than one month after the attacks on our soil, United States armed forces took the war to the enemy in Afghanistan. Many members of the *al-Qaeda* terrorist organization and their Taliban allies were killed or captured in the ensuing fight, and the global war on terrorism continues unabated.

The present case concerns Petitioner Hamdi's challenge to the legality of his detention by United States armed forces. It is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. Based on intelligence, the executive branch classified him as an enemy combatant and ordered him detained. Hamdi was initially detained in Afghanistan and then Guantanamo Bay. Once it was discovered that he may not have renounced his American citizenship, he was transferred in April 2002 to the Norfolk Naval Station Brig. In furtherance of its intelligence gathering efforts, the United States wanted to continue to detain Petitioner as an enemy combatant "in accordance with the law and customs of war." *Hamdi v. Rumsfeld*, 296 F.3d 278, 280 (4th Cir. 2002) ("*Hamdi II*").

The issues Petitioner raises – *e.g.*, being held without trial, lack of access to counsel, and lack of a set end date for his detention – all sound in domestic criminal law. Domestic criminal law, however, is inapplicable to the Petitioner. Because the United States is in an actual war and because Petitioner was determined by the President, based on available intelligence, to be an enemy combatant, domestic criminal law must yield to the law of war.[5] Nothing in the laws of the United States or the 1949 Geneva Conventions permits captured enemy combatants to challenge the legality of their detention in the courts of the detaining power during wartime.

The Nation's armed forces are actively engaged in military combat operations overseas against an actual enemy. Casualties are occurring on a regular basis. The President must be free to carry out his Constitutional obligations to

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[5] *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (noting that Constitutional war power is "the power to wage war successfully" and that "[w]here . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs"); *In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced."); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)) (noting as "obvious and unarguable" that there is no governmental interest more compelling than the Nation's security); William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (1998), at 222, 224-25 (noting that, in wartime, the balance between freedom and order "shifts in favor of the government's ability to deal with conditions that threaten national well-being" and the laws, though not silent, "speak with a somewhat different voice").

defend the Nation. These obligations include detaining United States citizens who, like Petitioner, "associate themselves with the military arm of the enemy government . . . ." *See Ex Parte Quirin*, 317 U.S. 1, 37-38 (1942).

The Constitution reserves the power to determine one's status as an enemy combatant to the Executive branch, and that determination is irrespective of United States citizenship. Even United States citizens, this Court has held, become enemy combatants when they take up arms against the United States:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government . . . are enemy belligerents within the meaning of the Hague Convention and the law of war.

Ex Parte Quirin, 317 U.S. at 37-38. The President has acted in accordance with his constitutional powers as Chief Executive and Commander in Chief and pursuant to the express authorization of Congress. Because the Constitution assigns to the political branches authority over Petitioner's status as an enemy combatant and the fact of his detention, these matters are beyond the proper reach of the judiciary. Hence, this Court should affirm the Fourth Circuit's ordered dismissal of Petitioners' writ.

ARGUMENT

Petitioners charge that Hamdi's detention without charges,

access to a hearing, or the right to counsel, violates numerous constitutional rights, including the rights to due process of law, to a speedy and public trial, and to counsel. *See* Pet. Brf at 14-21. Yet, Hamdi is not a criminal suspect; rather, he is an enemy combatant captured on the battlefield during the ongoing war on terrorism. His detention is preventive – to ensure that he does not again take up arms against U.S. forces – not punitive.

As will be shown *infra*, the United States is actually "at war" in the sense of our committed military involvement in Vietnam, Korea, and the two World Wars rather than in the sense of "the war on drugs," which is, and always has been, primarily a law enforcement effort. Hence, it is the law of war that governs United States conduct regarding enemy combatants in United States custody, not the United States domestic criminal justice system. Petitioner Hamdi is being detained as an enemy combatant, not as a criminal suspect. As such, it is the law of war that applies to his detention, not domestic criminal law.

Pursuant to the law of war, enemy combatants – regardless of their nationality – may be detained for the duration of hostilities without being charged with any crimes and without access to counsel to challenge the legality of their detention.

I. THE UNITED STATES IS CURRENTLY ENGAGED IN AN ACTUAL WAR IN WHICH THE ARMED HOSTILITIES ARE ONGOING.

A. Under the Laws of the United States, as Well as International Law, the Nation Is at War.

Following al-Qaeda's unprovoked attacks on the World

Trade Center towers in New York, the Pentagon in Virginia and a fourth hijacked civilian airliner which crashed in Pennsylvania, President Bush, in his role as Commander-in-Chief, took immediate action to protect the Nation. Those heinous attacks, by themselves, created a state of war between the United States and *al-Qaeda* and its allies, obliging the President, as Commander-in-Chief, to take action.[6] *See The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority"); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory"). Further, it is the President, as Commander-in-Chief, who determines whether those who threaten the Nation have "the character of belligerents," and, once that decision is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power is entrusted." *The Prize Cases*, 67 U.S. at 670; *see also In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard

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[6] Just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a formal Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, a state of war existed immediately following the 9-11 attacks upon the United States, despite the lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced").

The Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. In the Authorization for Use of Military Force, Congress authorized the President to "use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). This Congressional action constituted a *de jure* authorization of war and ratified the President's actions. *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding that how Congress gives its consent to engage in war is to be "a discretionary matter for Congress to decide;" "[a]ny attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (concluding that Congress may authorize use of armed force without a formal declaration of war); *Orlando v. Laird*, 443 F.2d 1039, 1042-43 (2d Cir. 1971) (same).

The judiciary has no authority to decide the political question of whether we are at war. The Fourth Circuit properly refrained from engaging Petitioner's argument that his detention was unlawful because the hostilities have ended: "The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them." *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003) ("*Hamdi III*"). This Court long ago designated

such matters as beyond the judiciary's proper reach: "[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed." *United States v. Three Friends*, 166 U.S. 1, 63 (1897).

The United States military response was not only authorized by United States laws, but international law also recognizes the nation's inherent self defense rights. *See, e.g.*, U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."). The right of the United States to defend itself was immediately reaffirmed by the UN Security Council in Security Council Resolution 1368, adopted on September 12, 2001. U.N.S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). Resolution 1368 expressed the Security Council's determination "to combat *by all means* threats to international peace and security caused by terrorist acts." *Id.* (emphasis added).

Consistent with article 51 of the UN Charter, various regional alliances of which the United States is a member also have determined the 9-11 attacks to be acts of war. Accordingly, those regional alliances have invoked the mutual defense provisions of their respective treaties. In fact, *for the first time in the history of the Alliance*, NATO implemented article 5 of the North Atlantic Treaty, which states "that an armed attack on one or more of [the Allies] in Europe or North America shall be considered an attack against them all." *See* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243. Article 5 specifically authorizes the "use of armed force" as a means to deal with such attacks on member states. *Id.*

Clearly, the events of 9-11 marked the entry of the United States into the war on terrorism every bit as much as the events of December 7, 1941, marked America's entry into the Second World War. The President, the Congress, U.S. allies, and key international bodies all have recognized that the attacks on the United States were acts of war and have responded accordingly.[7] Yet, despite the foregoing, Petitioner Hamdi insists that the courts order that he be released from military custody and be treated as a criminal defendant to receive the myriad rights and protections of the United States criminal justice system. In short, Petitioner is asking this Court to substitute its judgment for the judgment of the Executive and Legislative Branches on a question dealing with national security affairs. *See* discussion at section III, *infra*.

B. Armed Hostilities Trigger Application of the Law of War and Its Rules for Dealing with Belligerents

Part and parcel of any war is the capture and detention of enemy combatants. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. 3364. In fact,

> [t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war and represented one of the first great humanitarian advances in the history of armed conflict . . . . [T]he right to detain enemy combatants in wartime is so basic that it has rarely been adjudicated [in U.S. courts.] . . . It is an inherent part of the president's authority as commander-in-chief, and was well-known to the Constitution's framers. Alexander Hamilton addressed this very point in 1801. . . . Hamilton noted that "[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other" and that the Constitution does not require specific congressional authorization for such actions, at least after hostilities have commenced. Indeed, he wrote, "[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience."[8]

Given the existence of armed hostilities and the circumstances of Hamdi's capture, the President acted within his authority in declaring Hamdi to be an enemy combatant and in ordering him to be detained by the armed forces of the United States. *See* GPW, art. 39 (requiring that captured enemy combatants be detained in locations "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power"); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (characterizing "as 'well-established' the power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The Fourth Circuit correctly held that "it has long been established that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Hamdi II*, 296 F.3d at 283.

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[7] Rivkin1 at A19.

[8] David B. Rivkin, Jr., et al., *The Law and War*, part 2, WASH. TIMES, Jan. 27, 2004 ("Rivkin2"), at A19 (quoting Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987)).

II. THE PRESIDENT HAS PROPERLY EXERCISED HIS CONSTITUTIONAL WAR POWERS AS WELL AS THOSE EXPRESSLY AUTHORIZED BY CONGRESS

This Court in *Quirin* summarized the President's constitutional war powers:

> The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

Id. at 26.

Following the events of September 11, the President declared a national emergency, 66 Fed. Reg. 48199 (2001), thus triggering the President's war powers authority under The War Powers Resolution of 1973. *See* 50 U.S.C. 1541(c)(3). Nothing in the War Powers Resolution of 1973 constrains the President's use of his war powers.[9]

This Court also has set forth the basic principle that it is

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[9] Even though in this case the President's actions were sanctioned by Congress, precedent demonstrates that congressional authorization is not necessary for the Executive to exercise his constitutional authority to prosecute armed conflicts when, as on September 11, 2001, the United States is attacked. *See The Prize Cases*, 67 U.S. 635, 668 (1862) (holding that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected).

the President, as Commander-in-Chief in charge of military affairs, who is to determine enemy status of those who take up arms against the United States. *See The Prize Cases*, 67 U.S. at 670 (holding that during the Civil War, the President alone had the authority to classify southern confederates as enemy belligerents, and the Court must defer to such designations).

Further, as noted above, this Court has held that United States citizens who take up arms against the United States on behalf of a foreign power may also be detained as enemy combatants. *Ex Parte Quirin*, 317 U.S. at 37-38 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war"); *see also In Re Territo*, 156 F.2d 142 (9th Cir. 1946). In *Quirin*, this Court determined that captured Nazi saboteurs, including a United States citizen, were properly declared to be unlawful combatants who could lawfully be tried by Military Commission and executed for their unlawful belligerency. The Court specifically indicated that citizenship in the United States does not grant an enemy belligerent any special rights. 317 U.S. at 37.

In the wake of the tragedy that befell this nation on September 11, 2001, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons" . . . "to prevent any future acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Joint Resolution"). In the ensuing military operation, which is still ongoing, thousands of enemy combatants, including Petitioner, have been captured by American and Allied forces. Therefore, the

analysis should not end with the scope of the President's inherent war powers under Article II, since Congress expressly authorized the President to take the measures Hamdi contests. *See Quirin*, 317 U.S. at 29 (finding it "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power . . . for here Congress has authorized [his actions]"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, *J.*, concurring) ("When the President acts pursuant to an *express* or *implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") (emphasis added).

18 U.S.C. § 4001(a) does not require a different result. Petitioner argues that The Non-Detention Act, 18 U.S.C. §§ 4001(a), prohibits detention of U.S. citizens on U.S. soil as enemy combatants absent a precise and specific statutory authorization from Congress. The Fourth Circuit rejected Petitioner's argument under § 4001(a) based on the fact that Congress authorized the detention of enemy combatants when it issued the Joint Resolution. *Hamdi III*, 316 F.3d at 467. The court concluded that detaining enemy combatants was an "inherent part of warfare" and was therefore included in the authorization by Congress. *Id.* Congress must be presumed to have been aware of § 4001(a) when it passed the Joint Resolution and, indeed, because of § 4001(a), was careful to identify a specific group of belligerents. As such, one would be hard pressed to argue that Congress' did not contemplate the possible detention of a terrorist in its passage of the Joint Resolution. If § 4001(a) operates to deny the President the power to detain a U.S. citizen whom the President finds is an enemy combatant with ties to a terrorist organization plotting terrorist acts against the United States, then perhaps it is the constitutionality of § 4001(a) which should be examined.

III. THE PRESIDENT'S DECISIONS REGARDING HAMDI ARE NONJUSTICIABLE POLITICAL QUESTIONS.

"It is well established that the federal courts will not adjudicate political questions." *Powell v. McCormack*, 395 U.S. 486, 518 (1969). "It is the relationship between the Judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question,'" *Baker v. Carr*, 369 U.S. 186, 210 (1962), and the "nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* "Restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding 'political questions,'controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches." *Aktepe v. United States*, 105 F.3d 1400, 1402 (11th Cir. 1997) (citing *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986)). Further, "[s]eparation of powers is a doctrine to which the courts must adhere even in the absence of an explicit statutory command." *Id.* at 1402 (citing *Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992)).

The separation of powers takes on special significance when the nation itself comes under attack. Thus, foreign policy and military affairs figure prominently among the areas where the political question doctrine has been implicated. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) ("matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Aktepe*, 105 F.3d at 1403 (finding that political branches are accorded high degree of deference in area of military affairs). Indeed, as explained above, the Constitution commits the conduct of

foreign affairs and national security to the legislative and executive branches of government. *See, e.g., Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Johnson*, 339 U.S. at 786.

In *Baker v. Carr*, 396 U.S. 186 (1962), this Court identified six hallmarks of political questions, any one of which is sufficient to carry a controversy beyond justiciable bounds:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. As shown *infra*, the issues before this Court independently meet each of the six hallmarks of nonjusticiable political questions, thereby precluding this, or any other, court from granting the relief sought by Petitioners.

A. The Constitution Commits the Issues of Foreign Policy and National Security to the Legislative and Executive Branches.

The Constitution commits the issues raised in this matter

to the political branches of government. Article I, section 8, grants Congress the power to "provide for the common Defence and general Welfare of the United States . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy." Article II, section 2 declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Article III contains no counterpart to the specific powers of war so deliberately enumerated in Articles I and II. This Court has long recognized that "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25 (1942). Thus, one cannot ignore how the Constitution very carefully allocates power during wartime in such a way as to limit the role of the judiciary.

"The Supreme Court has repeatedly recognized that the President is the nation's 'guiding organ in the conduct of our foreign affairs,' in whom the Constitution vests 'vast powers in relation to the outside world.'" *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1313 (11th Cir. 2001) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948); and citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("recognizing 'the generally accepted view that foreign policy is the province and responsibility of the Executive'") (citation omitted)); *see also Haig*, 453 U.S. at 307 (concluding that foreign policy and national security overlap and "cannot neatly be compartmentalized"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . .

'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'" (quoting 6 Annals of Congress 613 (1816)); *Oetjen*, 246 U.S. at 302 (the Constitution commits the conduct of foreign affairs to the executive and legislative branches); *The Prize Cases*, 67 U.S. at 670 (when the President is acting as Commander-in-Chief, courts must recognize that it is the President who "determine[s] what degree of force the crisis demands" as well as whether those who threaten the Nation have "the character of belligerents").

The President also has broad authority as Commander-in-Chief. As this Court noted in *Hirabayashi*:

> The war power of the national government is "the power to wage war successfully. . . ." *It extends to every matter and activity so related to war as substantially to affect its conduct and progress*. . . . It embraces every phase of the national defense. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them *wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the means of resisting it*. . . . Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. at 93 (internal citations omitted) (emphasis added).

The underlying events in this matter stem from the United States' response to the 9-11 terrorist attacks perpetrated on our soil. The United States' response involves both foreign policy and national security components. Militarily, the President, with the explicit approval of the Congress, *see* Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . ."), ordered the armed forces of the United States into action to seek out and destroy the terrorists and those who succor them. This led to active hostilities in Afghanistan aimed at destroying the *al-Qaeda* terrorist organization and the Taliban regime which gave the terrorists safe haven.

Since hostilities began, United States agencies and armed forces have been identifying, capturing, and taking into custody members of the Taliban, the *al-Qaeda* terrorist organization, and their supporters – including Petitioner Hamdi. Due to the demonstrated suicidal nature of the 9-11 terrorist acts and the *kamikaze* philosophy that motivates many of the captured enemy combatants,[10] the President has determined that special security measures must be used to detain them. Such decisions are political decisions which implicate both the national security and foreign policies of the United States, whose execution rightly resides in the political branches. The Judiciary is ill-equipped to determine the

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[10] *See, e.g.*, www.latimes.com/news/nationworld/world/la-092401alqaeda.story ("[*Al-Qaeda* members'] commitment is unyielding. They film their own suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States").

possible impact of such decisions on the wartime foreign and national security policies of the Nation and should be wary of entering the realm of discretionary decision-making reserved to the President. *See Johnson*, 339 U.S. at 786 (characterizing "as 'well-established' the power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war"). The President's determination that Hamdi was an enemy combatant subject to detention under the law of war was his, not a court's, decision to make.

B. This Matter Lacks Judicially Discoverable and Manageable Standards.

No judicially discoverable and manageable standards exist for resolving the questions raised by the detention of the extremely dangerous enemy combatants in the war on terrorism. Decisions about prosecuting a war and dealing with captives must often be made on an *ad hoc* basis, depending on unique, often unpredictable, circumstances. The day-to-day prosecution of war and decisions related directly to that decision, such as the status and care of captured enemy combatants, rightly reside with the President in his capacity as Commander-in-Chief. *See, e.g., Hamilton v. Kentucky Distilleries & Whiskey Co.*, 251 U.S. 146, 161 (1919) (concluding that war power includes power "to remedy the evils which have arisen from [a conflict's] rise and progress") (quoting *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870)); *In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced.") (citing *Stewart*, 78 U.S. at 507). Given the unique events of 9-11 and the unique nature of the war on terrorism, the President

deserves the latitude and benefit of the doubt as he seeks to grapple with a heretofore unknown situation and to develop effective policies to restore peace.[11] These decisions are discretionary judgment calls. Nothing in the Constitution exists to guide a judicial examination of the President's exercise of that judgment.

Due to the unique nature of the war on terrorism, the President must be able to make informed judgments about how best to deal with captives. Unlike in previous conflicts, many of the detainees in this conflict appear to possess a mindset bent on carrying out suicidal attacks on Americans. This mindset makes the handling of captives particularly dangerous and calls for special security measures and extreme caution. Such policy decisions are for the President and Congress to make, not the courts. Not only are members of the terrorist network especially dangerous (since they can "hide" in plain view in American society), but such persons, when apprehended, may be treasure troves of vital intelligence information needed by the President to thwart other terrorist attacks. As such, detaining such persons as enemy combatants under the law of war better serves the security interests of the United States than trying them for violations of the United States criminal code.[12] Such policy

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[11] *See* www.whitehouse.gov/news/releases/2001/09/20010913-12.html (When asked whether there can be a war without a formal enemy, White House Press Secretary Ari Fleischer replied: "[A]s the President has indicated, this is a different type of enemy in the 21st century. The President said, this enemy is nameless; this enemy is faceless; this enemy has no specific borders. . . . It is a different type of enemy. . . .").

[12] This is not to say that criminal charges cannot be brought; however, during war, there are valid reasons to refrain from prosecuting such an individual criminally and, instead, to detain him in accordance with the law of war. Such reasons include ensuring that he does not rejoin the

decisions rightly reside with the President as Commander-in-Chief, not with the courts. Moreover, the President and the Congress are in agreement here. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001). Further,

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. *But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.* Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. *They are delicate, complex, and involve large elements of prophecy.* They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of the political power not subject to judicial intrusion or inquiry.*

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (citing *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *Curtiss-Wright*, 299 U.S. at 319-21; *Oetjen*, 246 U.S. at 302) (emphasis added).

C. It Is Impossible to Decide This Matter Without an Initial Policy Determination of a Kind Clearly For Nonjudicial Discretion.

The President, as Commander-in-Chief, is charged with responsibility for prosecuting the ongoing war on terrorism, and this Court has noted as "obvious and unarguable" that there is no governmental interest more compelling than the Nation's security. *Haig*, 453 U.S. at 307 (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)); *accord Cole v. Young*, 351 U.S. 536, 546 (1956).

The Fourth Circuit identified the practical reality beneath the deference which courts historically have shown to the political branches when dealing with sensitive matters of foreign policy, national security, or military affairs:

> Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the war-making powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them.

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fight for the duration of hostilities and gathering intelligence. In such situations, the decision as to what to do with such an individual is a political decision to be made by the President without second-guessing by the courts. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs").

Hamdi III, 316 F.3d at 463. This Court has echoed the need for "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

Just the issue of what to do with enemy combatants who may fall into United States hands is a political question which implicates a whole host of matters. For example, once United States forces have taken enemy combatants into custody, they must ensure that such persons are no longer able to take up arms against U.S. forces or harm their captors, that perpetrators of war crimes are properly identified and punished, and that information of intelligence value is timely obtained.

Enemy belligerents are detained, not based on probable cause or other important domestic constitutional principles, but because of their armed belligerency, capture, and continuing threat to American interests. *Their detention, therefore, is preventive rather than punitive*. As mentioned earlier, *al-Qaeda* captives present an additional dynamic – their willingness to be suicidally aggressive. This makes them especially dangerous because they may kill without compunction or hesitation. As such, the President is faced with a heretofore unknown and extremely grave situation, and it is his responsibility to formulate and implement policies to protect and defend the United States. He both needs and deserves the latitude to develop such policies without undue interference by an overreaching Judiciary.

The prosecution of a war involves both foreign policy and national security issues which generally fall outside the realm of judicial competence.

> [I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

People's Mojahedin Organization of Iran v. United States Dep't of State, 182 F.3d 17, 23 (D.C.Cir. 1999) (quoting *Chicago & Southern*, 333 U.S. at 111). The same is true for military decisions. *See, e.g., Hirabayashi*, 320 U.S. at 93 (noting the wide discretion given the political branches in dealing with war issues and recognizing that courts should not substitute their judgment for that of the political branches).

Petitioner Hamdi was captured on the battlefield in Afghanistan. The President, as Commander-in-Chief, has determined that it is more important to national security to place him in preventive custody pursuant to the law of war than to punish him for any criminal acts. That is a political determination. This Court should not lightly intrude on the executive function of waging war. As the Fourth Circuit cautioned, "[f]or the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical." *Hamdi III*, 316 F.3d at 463.

D. It Would Be Impossible to Undertake Independent Resolution Without Expressing Lack of Respect Due Coordinate Branches of Government.

Adjudicating this matter would express a lack of respect for the political branches of government by subjecting their

discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the Judiciary's relative lack of expertise in such areas. Detaining enemy combatants is a political matter, and allowing enemy combatants to challenge the legality of their detention in the domestic courts of the detaining power would undoubtedly handicap the relevant military operations being conducted. Moreover, subjecting the war making decisions of the political branches to judicial oversight would constitute "a conflict between judicial and military opinion highly comforting to enemies of the United States." *Johnson*, 339 U.S. at 778-79. Requiring the President to obtain judicial assent to his actions in a time of war renders the separation of powers a nullity. *See Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir.) (per curiam), *cert. denied*, 387 U.S. 945 (1967) ("The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.").

For example, the circumstances and rationale behind Petitioner Hamdi's detention are set forth in an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs ("the Mobbs Declaration"). According to the Mobbs Declaration, the military determined that Petitioner had traveled to Afghanistan in July or August of 2001 where he became affiliated with a Taliban military unit and received weapons training. After September 11, 2001, Petitioner was captured when his Taliban unit surrendered to Northern Alliance forces with whom it had been fighting. Included in the Mobbs Declaration was the fact that Hamdi was in possession of an AK-47 rifle at the time of his surrender. To evaluate this recitation of the rationale for detaining Petitioner in military custody as an

enemy combatant, a court would have to substitute its opinion for that of the military and the President.

E. There Is a Need For Unquestioning Adherence to the Political Decision Already Made by the President.

The situation faced by the United States today is without historical precedent. The United States has suffered well-planned, coordinated attacks on the political and economic centers of this Nation. The President, with Congress' explicit concurrence, has taken decisive steps to meet the threat and protect the Nation. Such steps should not be subjected to second-guessing by the Judiciary. *See Haig*, 453 U.S. at 307 (concluding it to be "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation) (citing *Aptheker*, 378 U.S. at 509); *accord Cole*, 351 U.S. at 546; *Hirabayashi*, 320 U.S. at 93 (nation's war power is "the power to wage war successfully").

We are facing an enemy who willingly commits the most horrendous, suicidal acts against innocent civilians and who is actively seeking out the opportunity to do so again. Because this situation is without historical precedent, no one can know for sure how much success emerging policies will have. As such, it would be inappropriate for the courts of the United States to enter the political fray and attempt to second-guess the policies adopted by the President to meet this threat. Any appearance of official opposition by the judiciary to the President's war policies will surely demoralize the men and women in the U.S. armed forces who are daily putting their lives at risk to ensure that those policies are implemented.

In this case, the President is acting pursuant to his

authority as Chief Executive, *see The Prize Cases*, 67 U.S. at 668 ("The Constitution confers on the President the whole Executive power."); as Commander-in-Chief, U.S. CONST. art. II, § 2, cl. 1; and with statutory authority granted by the Congress. Pub. L. No. 107-40, 115 Stat. 224 (2001). Moreover,

> [w]hen the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. *In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation. . . ."*

Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring)) (emphasis added). Given this conciliation between the President and the Congress, this Court should defer to the President's decision regarding Petitioner Hamdi's detention.

F. There Is Potential For Embarrassment From Multifarious Pronouncements by Various Departments on One Question.

The President as Chief Executive of the United States and Commander-in-Chief of its armed forces is responsible for a whole host of decisions concerning the building of coalitions and prosecution of the war on terrorism. One such decision is how to treat enemy belligerents taken captive by United States armed forces. This issue is especially important given the nature of the war and the fact that nationals from countries friendly to the United States are numbered among the enemy combatants being detained by the United States. The issue of the fair and equal treatment of enemy combatants detained by

the United States in the war on terrorism is an important and emotional issue for many nations. The President must have the discretion to deal with United States citizens who have taken up arms against the United States in the same way he deals with captured enemy combatants from other nations.

Because of the unique nature of this war and the need to maintain coalitions with a broad array of foreign governments, it is necessary for the Nation to speak with one voice. *See, e.g., Baker*, 369 U.S. at 211 (recognizing the special importance of our nation speaking with one voice in the field of foreign affairs). It is the Executive who has been given the responsibility to speak for the Nation as a whole, and, given the high stakes involved, the Judiciary must tread lightly so as to avoid undermining the President's ability to successfully prosecute the ongoing war. It is the President who must determine the risks and benefits of national policy, not the courts, and it is in times of grave national crisis and danger that the courts must defer to the elected leaders to craft appropriate policies in the Nation's interest. This is such a time. This Court should not substitute its judgment for that of the military and the President.

CONCLUSION

Hamdi's detention is pursuant to the President's well-established authority to detain an enemy combatant during wartime. *Quirin*, 317 U.S. at 37-38. In addition, Hamdi's conduct was well within the threat identified in the Joint Resolution. Under the Constitution's allocation of war powers, neither Petitioner's status as an enemy combatant, nor the fact of his detention are subject to judicial scrutiny. As the Fourth Circuit explained, "Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme."

Hamdi III, 316 F.3d at 477. To use Justice Goldberg's oft-quoted phrase, the Constitution "is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963).

For the foregoing reasons, *amicus* American Center for Law and Justice urges this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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